1990

Estate Landscape and Snow Removal Specialists, Inc. v. The Mountain States Telephone and Telegraph Company : Unknown

Utah Supreme Court

David D. Loreman; Attorney for Plaintiff-Respondent Estate Landscape and Snow Removal Specialists, Inc..
Floyd A. Jensen, Esq.; Attorney for Defendant-Appellant; The Mountain States Telephone and Telegraph Company.

BRIEF

IN THE UTAH SUPREME COURT

ESTATE LANDSCAPE AND SNOW REMOVAL SPECIALISTS, INC.,

Plaintiff and Respondent,

vs.

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,

Defendant and Appellant.

Court of Appeals
Case No. 880428-CA

900312

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Appeal from a judgment of the Third Judicial District Court in and for Salt Lake County, State of Utah, The Honorable Timothy R. Hanson, District Court Judge, presiding.

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QUESTIONS PRESENTED FOR REVIEW

1. When a check is tendered without condition and a subsequent letter presumes to create a condition, is that sufficient for an accord?

2. When the letter creating the condition identifies the total amount paid as undisputed invoice dates, is this sufficient as an accord for dates that were disputed?

REFERENCE TO REPORT OF THE OPTION OF THE COURT OF APPEALS

The Court of Appeals opinion is reported at 1990 SL 69055.[1]

STATEMENT OF JURISDICTION OF THE UTAH SUPREME COURT

The Court of Appeals filed its opinion May 24, 1990. No petition for rehearing was filed, nor was any order entered extending the time for filing a petition for writ of certiorari. The Utah Supreme Court has jurisdiction to review the decision of the Court of Appeals under the authority of Utah Code Ann. Sections 78-2-2(3)(a) and 78-2-2(5), and Rules 42-48 of the Rules of the Utah Supreme Court.

CONTROLLING PROVISIONS OF STATUTES, ETC.

There are no controlling provisions of constitutions, statutes, ordinances, or regulations in this case.

STATEMENT OF THE CASE

1. Nature of the Case

This is a civil action for collection of money for snow

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[1] This Response to Petition for Writ of Certiorari will refer the opinion reported as Estate Landscape v. Mountain States Telephone, 135 Utah Adv. Rep. 55 (Utah App. 1990), attached as Appendix A.

removal services rendered under a written contract.

2. Course of the Proceedings

Estate Landscape and Snow Removal, Inc. ("Estate") filed its complaint on August 8, 1985, praying for damages of $30,162.50 (R. 2). Estate filed and Amended Complaint on May 16, 1986, praying for damages of $21,549.50 (R. 24). On July 31, 1986, The Mountain States Telephone & Telegraph Company ("Mountain Bell") filed a motion for summary judgment based on the affirmative defense of accord and satisfaction (R. 45), which the Court (Judge Michael Murphy presiding) denied in a Summary Decision and Order filed December 29, 1986 (R. 127). The case was tried to the Court (Judge Timothy Hanson presiding) on January 12 and 13, 1988.

3. Disposition in the Lower Courts

On April 1, 1988, the trial court entered judgment for Estate. Mountain Bell appealed to the Court of Appeals. On May 24, 1990, the Court of Appeals affirmed the judgment for the principal, but remanded for amendment of the judgment to exclude compounded interest.

4. Statement of Relevant Facts

Estate agrees to the rendition of facts presented by Appellant with the following changes. With regard to the snow reaching four (4) inches, it was determined by the trial court that the term was ambiguous and that it meant plowing costs for every four (4) inches.[2] Exhibit 6 contained an itemized list of

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[2]Ruling of the Judge Hanson, Page 11, Lines 4 through 12.

dates and amounts that appellant disputed which when added together was the exact amount demanded for by respondent in the letter of July 23, 1985. (R. 84) Requests for admissions filed by Appellant on October 28, 1986, admit that Appellant did receive letters from Respondent dated June 25, 1985 and July 23, 1985. (R. 81-84)

ARGUMENT

OFFER OF UNRESTRICTED CHECK THAT REPRESENTED THE UNDISPUTED BILLINGS DOES NOT AMOUNT TO AN ACCORD AND SATISFACTION WHEN THAT CHECK IS NEGOTIATED.

Appellant's argument supposes that there was a finding that the check tendered by appellant was an offer of an accord. A motion in limine was tendered to the trial court on the issue of accord and satisfaction. That motion was withdrawn so that appellant had every opportunity to submit evidence to the court on the accord and satisfaction defense. The ruling by the court on that issue was as follows:

> The status of the evidence that Judge Murphy considered in denying that motion for summary judgment, that issue, and I note that it's not merely just a motion for summary judgment denied, but, rather, he goes into detail and identifies the law upon which he relies and indicates for the record what the law is that's applicable to the case at that point in time. And while he denied the motion for a summary judgment, I think it carries more weight than merely a minute entry saying motion for summary judgment is denied. . . .
>
> And even if it were not the law of the case, and I think this is equally as important, considering the letter that was sent, I believe it was Plaintiff's 6, in any event the letter -- the letter of June 14th, Exhibit 6, considering that as a whole I can only excise out that part. There are certainly difficulties as to what it means.
>
> But the long and short of it is I believe it falls

> into that area of law that Judge Murphy identified as being not in accord and satisfaction, and I agree with that. And I see no reason to even consider changing it even if it was not the law of the case. [emphasis added]

The Trial court found that the letter that contained the restrictive language did not rise to the level of an accord and the Court of Appeals agreed.

Appellant relies on the cases of Marton Remodeling v. Jensen, 706 P.2d 607 (Utah 1985) and Cove View Excavating and Construction Company v. Flynn, 758 P.2d 474 (Utah App. 1988). There is however a major distinction that Appellant has not seemed to articulate to this Court. In Marton Remodeling and Cove View, the checks that were offered in full satisfaction of those disputes had the language of accord written on the checks. The would be accord in the case at bar was presented in a separate document sent some time after the check.[3] Thus almost two (2) months had passed before appellant had made any attempt to offer an accord to respondent. The trial court before Judge Murphy in the ruling of Summary Judgment dealt with this matter under Marton Remodeling and viewed the separate dates of service by respondent as separate and distinct parts that could not be subject to a one time accord and therefore, was controled by the decision in Dillman v. Massey Ferguson, Inc., 13 Utah 2d 142,

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[3]Respondent received the June 1985 check on or about June 25, 1985 and did not receive the letter containing the alleged accord until August 5, 1985. See Appendix C for admissions of letter of June 25, 1985 and Petition for Writ of Certiorari at page 4 for date of receipt of petitioner's letter.

369 P.2d 296 (1962).[4] Judge Hanson stated in his conclusions of law that:

> 1. Based on the Court's Finding of Facts, it is hereby concluded that there was no accord and satisfaction in that the Order of Judge Michael R. Murphy delineated the area fully and is the law of the case. Even if it were not the law of the case, Exhibit 6 introduced into evidence did not fulfill the requirements of an accord and satisfaction. [emphasis added]

Prior to the appeal in this matter two trial court judges heard all facts relevant to the accord and satisfaction defense and both came to the same conclusion. Judge Hanson's decision was not just one of determining that Judge Murphy's ruling was the law of the case, he also made the independent observation that even if Judge Murphy had not ruled against the accord and satisfaction defense Judge Hanson would have found that no accord and satisfaction existed. The trial court determined that the letter did not amount to an accord the Court of Appeals determine that there could be no assent to the accord based on the facts presented.

The Court in Cove View stated that:

> The elements essential to contracts generally must be present in an accord and satisfaction, including an offer and acceptance and a meeting of the minds. cases cited

Id. at 476. The Court of Appeals in the case at bar followed its standards as set forth in Cove View by analyzing this matter to determine if there was actually a contract present. From the

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[4]Copy of full Summary Decision and Order set forth in appendix "B". (R. 127 - 131)

facts, an offer of $8,613.00 (EIGHT THOUSAND SIX HUNDRED THIRTEEN DOLLARS) was delivered to Respondent on or about June 25, 1985. There was no offer of any kind submitted with the check of June 1985.[5] On July 23, 1985, a letter was sent to Appellant stating that the check was kept as partial payment on the outstanding obligation and that a total sum of $21,549.50 (TWENTY-ONE THOUSAND FIVE HUNDRED FORTY NINE DOLLARS AND FIFTY CENTS) was due. (R. 84) The check was submitted unconditionally and was accepted as such by the letter of July 23, 1985. Therefore, if Appellant's subsequent letter received August 5, 1985 contained additional terms it would not have any effect on the conditions of the contract because what contract could have been made with regard to the check of June 1985 was accepted on July 23, 1985 under the terms already stated.

The Court of Appeals stated that:

> From Mountain Bell's point of view, the accord is contained essentially in its letter of June 14, 1985, to Estate Landscape. However, this letter is entirely unilateral; there is no indication that Estate Landscape accented to the letter as an accord. Its signature on the check is not an ascent to an accord not found on the face of the check as a restrictive endorsement, where the party to whom the accord is offered has expressly rejected the proposed accord continued the dispute, and filed litigation to resolve it adversarially in court. [emphasis added]

Estate Landscape v. Mountain States Telephone, 135 Utah Advance Reports 55, 57 (Utah App. 1990). The position of the Court of

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[5]Petitioner stated at page 4 of the Petition for Writ of Certiorari "However, on or about June 21, 1985, rather than delivering the check to the person holding the letter, Mountain Bell's accounting department mailed the check directly to Estate".

Appeals is that there was no assent to the accord by respondent. The case was filed in August of 1985 and the check was not cashed until October of 1985, litigation was pursued and no further evidence was submitted by petitioner that the check was going to be full settlement of the matter. This would indicate that petitioner understood the letter of July 23, 1985 and the filing of the present action was an expressed refusal of any would be accord. As the Court of Appeals stated:

> Estate Landscape acted within its rights in cashing check as payment of the portion of its claim that Mountain Bell agreed was owing; in fact, it may have had a duty so to act in order to properly mitigate its damages.

Id. at 57. The letter entered as exhibit 6 admits that petitioner owed to respondent the amount of the check of June 1985. Under URCP 56 respondent would have been entitled to partial summary judgment on the amount not in dispute. However, by cashing the check and amending the complaint to reflect the amount in dispute respondent performed the same task without having to involve the court unnecessarily. Based on the Court of Appeals ruling respondent was probably under a duty to mitigate its damages. That damage would be the interest that would accumulate on the principle of the amount not in dispute. It is conceivable that respondent could have lost approximately $2,583.90 in interest by not cashing the check.[6] The only way

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[6]Amount calculated by taking the amount of the check ($8,613.00) and the legal rate of interest of 10% and multiplying to obtain the amount due on the check for a period of 3 years. (Date of Original Invoice and Date of Judgment 4/85 to 3/88)

to avoid the result is to do exactly what the Court of Appeals suggested and cash the check.

In the analysis of this appeal the Court of Appeals did not change its position found in Cove View nor did it decide the case contrary to the Supreme Courts' decision in Marton Remodeling. The facts found in the record of this case do not show any payment by petitioner that had any condition that could be classified as an accord to respondent. Judge Murphy decided this in the opinion of Summary Judgment, Judge Hanson decided this in his ruling after trial on the entire matter, and the Court of Appeals determined this after hearing the appeal. After 5 years of litigation, two trial court judges and the Court of Appeals decisions determining that no accord existed respondent requests that this Court deny the Petition for Writ of Certiorari.

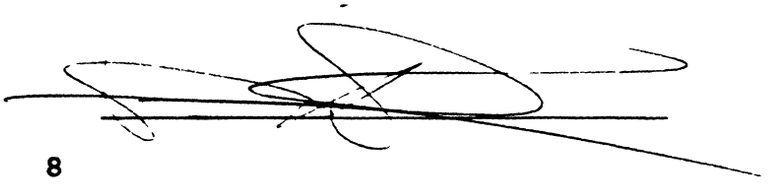
RESPECTFULLY SUBMITTED this 31st day of August, 1990.

David D. Loreman
Attorney for Respondent

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing RESPONSE TO PETITION FOR WRIT OF CERTIORARI was mailed postage prepaid this 31st day of August, 1990, to:

Floyd A. Jensen, Esq.
250 Bell Plaza, 16th Floor
Salt Lake City, Utah 84111



APPENDIX

A. Estate Landscape v. Mountain States Telephone, 135 Utah Adv. Rep. 55 (Utah App. 1990)

B. Summary Decision and Order denying Mountain Bell's Motion for Summary Judgment

C. Defendant's Responses to Plaintiff's Request for Admissions

A. Estate Landscape v. Mountain States Telephone, 135 Utah Adv. Rep. 55 (Utah App. 1990)

> suppressed or destroyed evidence is vital to the issues of whether the defendant is guilty of the charge and whether there is a fundamental unfairness that requires the Court to set aside the defendant's conviction.

State v. Lovato, 702 P.2d 101, 106 (Utah 1985).

Defendant argues that the evidence is material since if Karmelian actually identified Webb rather than defendant as the robber, such evidence would exculpate defendant. We agree that the photo array should have been preserved for potential exculpatory purposes. However, defendant was also positively identified in court by Church, who viewed the robber in the store at close range and who was not shown any photos of defendant prior to trial. Since the photos were not the sole source for a finding of defendant's guilt, we find that the destroyed photos lacked materiality in the constitutional sense.

ISSUES RAISED IN DEFENDANT'S PRO SE SUPPLEMENTAL BRIEF

Following careful consideration of the arguments raised in defendant's pro se supplemental brief, we conclude that they are meritless and that discussion of them is unnecessary. *See State v. Carter*, 776 P.2d 886, 888-89 (Utah 1989).

SENTENCE

Finally, we address an issue not raised by defendant, but by the State, "in adherence to its duty to promote justice." *State v. Bartley*, 124 Utah Adv. Rep. 40, 44 (Ct. App. 1989). Based on the Utah Supreme Court's interpretation in *State v. Willett*, 694 P.2d 601 (Utah 1984), of the firearm enhancement statute as providing for a maximum enhancement term of five years, the State concedes that the trial court abused its discretion by imposing a six-year firearm enhancement term. As in *Webb*, 131 Utah Adv. Rep. at 53-54, we direct the trial court upon remand to reduce the enhancement sentence for use of a firearm in the commission of aggravated robbery from six years to a total of five years.

Affirmed, with instructions to correct the sentence.

Pamela T. Greenwood, Judge

WE CONCUR:
Judith M. Billings, Judge
Gregory K. Orme, Judge

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1. There is no apparent reason for defendant submitting a motion in support of the alleged interests of his codefendant, Webb.

2. In *Webb*, we assumed without deciding that for purposes of a sixth amendment analysis of a claim of ineffectiveness of counsel, two law partners or associates are considered one attorney. *Id.* at 54-55 n.3 (citing *Burger v. Kemp*, 483 U.S. 776, 107 S. Ct. 3114, 3120 (1987)); *see also Martinez v. Sullivan*, 881 F.2d 921, 930 (10th Cir. 1989).

3. Federal Rule of Criminal Procedure 44(c) provides a procedure for protecting a defendant's sixth amendment right to effective assistance of counsel where two or more defendants have been jointly charged or are to be jointly tried, and are represented by the same counsel. The rule provides that

> the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

Fed. R. Crim. P. 44(c).

The notes of the advisory committee on rules state that "[u]nder rule 44(c), an inquiry is called for when the joined defendants are represented by the same attorney *and also when they are represented by attorneys 'associated in the practice of law.'*" Fed. R. Crim. P. 44 advisory committee notes, 1979 amendment (emphasis added). The particular measures to be taken in this inquiry are not set forth in the rule, but are left to the court's discretion. *Id.*

At least one state court requires an inquiry when multiple defendants are to be represented by separate public defenders from the same office. *See State v. Bell*, 90 N.J. 163, 447 A.2d 525, 530 (1982).

In order to avoid claims such as raised herein, it would be beneficial if, when codefendants are represented separately by public defenders, Utah trial courts utilized a similar procedure, by obtaining an on record consent to the representation. This practice would clarify that a defendant has considered and waived possible conflicts of interests. Given the "conflicts of interests [that] could arise when office associates represent co-defendants," *Barella*, 714 P.2d at 289, there may be benefits in having defendant's consent a matter of record. Such a practice should not, however, preclude the obligation of a trial court to sever joint representation if an actual conflict were to arise.

Cite as
135 Utah Adv. Rep. 55

IN THE UTAH COURT OF APPEALS

ESTATE LANDSCAPE AND SNOW REMOVAL SPECIALISTS, INC.,
Plaintiff and Appellee,
v.
MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,
Defendant and Appellant.

No. 880428-CA
FILED: May 24, 1990

Salt Lake County, Third District, Honorable Michael R. Murphy and Timothy R. Hanson.

ATTORNEYS:

Floyd A. Jensen, Salt Lake City, for Appellant

David D. Loreman and Lowell V. Summerhays, Murray, for Appellee

Before Judges Davidson, Jackson, and Larson.[1]

OPINION

LARSON, Judge:

This is an action seeking to collect amounts alleged to be due under a contract for snow removal services rendered by Estate Landscape and Snow Removal Specialists, Inc. (Estate Landscape). Defendant Mountain States Telephone and Telegraph Company (Mountain Bell) appeals from a judgment in favor of Estate Landscape.

Estate Landscape and Mountain Bell entered into a written contract which provided that Estate Landscape would remove snow from certain buildings occupied by Mountain Bell in return for payment at a specified rate. Estate Landscape performed its work suitably, and billed Mountain Bell twice, once for work through December 27 and again at the end of the snow season.[2] The billing separately listed each snow removal item by date.

Mountain Bell paid the first bill, but considered the $30,162.90 total of the second bill to be excessive for the services at its Alta office. It therefore sent Estate Landscape a check for only $8,613. The check did not contain a restrictive endorsement or a waiver on its face. Upon receipt of the check, Estate Landscape responded by acknowledging partial payment and requesting the balance remaining, but Mountain Bell refused to pay the balance. Next, Mountain Bell sent Estate Landscape a letter[3] explaining its position concerning the bill for the Alta office. According to the letter, the contract for the Alta office provided that Estate Landscape would remove snow when it reached a depth of four inches. From snowfall records for Alta, it appeared that Estate Landscape had billed for snow removal on days when the snowfall was less than four inches. On the basis of the snowfall records, therefore, Mountain Bell refused to pay for snow removal on certain days for which Estate Landscape had charged for its services. The letter specifically detailed all contested snow removal services by date. Mountain Bell's letter concluded:

> Based on the above identified billing discrepancies we have enclosed[4] a check for $8613.00 which is payment in full for satisfaction of contracted services. If you are not *willing to accept that sum, $8613.00 in full satisfaction of sums due, DO NOT negotiate the check, for upon your negotiation of that check, we will treat the matter as fully paid.*

(Emphasis in original).

When Estate Landscape received the letter, the check it had earlier received from Mountain Bell had not been cashed. Estate Landscape responded to Mountain Bell's letter by commencing this action against Mountain Bell. Initially, Estate Landscape complained for the entire $30,162.90 of its second bill for the winter of 1984-85. About two weeks after filing suit, Estate Landscape endorsed the check from Mountain Bell and cashed it, then amended its complaint against Mountain Bell to seek only the difference between the amount of the check and the amount billed.

Mountain Bell moved for summary judgment on the grounds that its letter and check tendered to Estate Landscape were an accord and satisfaction of its obligation under the snow removal contract. The district court, per Judge Michael R. Murphy, denied the motion, noting that Mountain Bell admitted that it owed the amounts tendered in the check. The case proceeded to trial before the bench.

At trial, Judge Timothy R. Hanson considered the earlier denial of summary judgment to have resolved the question of accord and satisfaction, and granted judgment to Estate Landscape for the amount of its bill, less certain charges for work not mentioned in the contract. The judgment included interest accruing before judgment, compounded annually. Mountain Bell appeals.

Factual Standard of Review in Summary Judgment

Mountain Bell now argues that the trial court erred in treating its motion for summary judgment as dispositive of its accord and satisfaction defense and thereafter refusing to reopen that issue at trial on the grounds that it was law of the case. Mountain Bell argues that the combined effect of the dispositive summary judgment and the refusal to try the issue was an unfairly skewed view of the facts in the district court. Mountain Bell argues that the court views the facts for summary judgment purposes in a light unfavorable to the moving party, and therefore, because the summary judgment was treated as conclusive against the movant, the movant here, Mountain Bell, never had a chance for a fair view of the facts on the issue.

Mountain Bell, however, is not precisely correct in thus describing a court's factual viewpoint in deciding a motion for summary judgment. Although it may be true for most summary judgments that the court views the facts in favor of the nonmovant, that formulation takes into account only perhaps the

most common outcomes of a motion for summary judgment, in which the moving party either receives the judgment it seeks, or all judgment is denied and the issue reserved for further consideration. However, in this case, Mountain Bell moved for summary judgment, and its motion was denied on the merits, and that denial effectively disposed of Mountain Bell's accord and satisfaction defense.[5] Later, that disposition was regarded as the law of the case, and the accord and satisfaction issue was not reopened.[6]

Recognizing that the party adversely affected by the summary judgment has not had an opportunity for trial, the court views the facts in the light most favorable to that party.[7] In situations in which summary judgment is granted, the party adversely affected would be the party who did not move for summary judgment. If summary judgment is denied on the merits and a claim or defense of the movant thereby eliminated, then the facts are viewed in the light most favorable to the moving party. Summary judgment may also be denied without reaching the merits of any claim or defense, often because the court cannot reconcile the material elements of the parties' versions of the facts, and thus cannot grant a summary judgment under Utah R. Civ. P. 56(c).[8] Since any material difference in the parties' versions of the facts will preclude summary judgment, the shadings of light in which the facts are viewed cannot make a substantial difference in the result, even if the shading applied is erroneous.

In this case, Mountain Bell was the movant for summary judgment on the accord and satisfaction issue. The district court's memorandum decision on Mountain Bell's motion was clearly intended to lay the defense of accord and satisfaction to rest. Since a defense of Mountain Bell's was thereby eliminated, the facts should be viewed in the light favorable to Mountain Bell. The record does not explicitly note whether the district court thus viewed the facts; however on appeal, we view the facts supporting a summary judgment through the same lens filter as the trial court.[9] Therefore, since the issue of correctness of the summary judgment on its merits is before us, we proceed to review it in the light most favorable to Mountain Bell.

Lack of an Accord

In denying summary judgment on the merits, the district court reasoned that the contract for snow removal in this case was severable, and that the scope of the accord was therefore limited to only part of the contract. According to this reasoning, the accord and satisfaction did not fully discharge the contract.[10]

Identifying which claim or claims are the subject of an accord and satisfaction depends on the manifested intent of the parties.[11] However, before we can determine the contractual intent of the parties, we must have a contract. There is no contractual intent to be discovered where there has been no mutual assent. In this case, the mutual assent for the would-be accord is lacking.[12]

From Mountain Bell's point of view, the accord is contained essentially in its letter of June 14, 1985, to Estate Landscape. However, this letter is entirely unilateral; there is no indication that Estate Landscape assented to the letter as an accord. Its signature on the check is not an assent to an accord not found on the face of the check as a restrictive endorsement,[13] where the party to whom the accord is offered has expressly rejected the proposed accord, continued the dispute, and filed litigation to resolve it adversarially in court. It is therefore apparent that an accord was offered, a check tendered in anticipation that an accord would be reached, and a letter sent indicating what Mountain Bell intended and would do if the check were negotiated, but there is no indication of Estate Landscape's assent to the accord. Even in the light most favorable to Mountain Bell, the evidence simply falls short of demonstrating Estate Landscape's acceptance of Mountain Bell's offer to settle the account. It would, perhaps, be possible to offer an accord and provide in the offer that cashing an accompanying check would be acceptance of the offer, since the offeror can, within reason, specify the act that shall constitute acceptance.[14] However, the offeree can also reject the offer, after which there is nothing left to accept. We believe that the telephone conference continuing the dispute and the filing of litigation amount to a rejection of the offered accord. After the litigation was underway, there remained the question of what to do with Mountain Bell's tendered check in Estate Landscape's possession. Estate Landscape acted within its rights in cashing check as payment of the portion of its claim that Mountain Bell agreed was owing; in fact, it may have had a duty so to act in order to properly mitigate its damages. Thus, even if we resolve any immaterial factual doubt in Mountain Bell's favor, this appears to be a situation in which one party asserts an accord to which the other party, for all that appears, never agreed. In such a case, accord and satisfaction is not a defense for lack of a binding accord.

Compounding of Interest

Mountain Bell's final argument is that, even if it is liable for the amount of the judgment, the interest on the judgment should not have been compounded. The general rule is that simple, not compound, interest accrues on a judgment, unless the parties contract otherwise,[15] which they have not in this case, or unless the statute providing for interest on judgments expressly requires compounding,

which ours does not.[16]

This rule against compound interest on judgments is consistent with the general judicial disfavor of interest on interest.[17] It is also of long standing and forms part of the backdrop against which the Legislature has statutorily provided for interest on judgments. We see no compelling reason to alter this longstanding gloss on the judgment interest tatute.[18] We therefore decline the invitation to engraft onto the statute judicial discretion to allow compound interest[19] and reverse as to the award of compound interest.

Except in regard to the interest provided in the judgment, the trial court's decision is affirmed. We vacate the provisions of the judgment relating to interest and remand for amendment of the judgment to provide for simple, rather than compound, interest.

John Farr Larson, Judge

I CONCUR:

Richard C. Davidson, Judge

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1. John Farr Larson, Senior Juvenile Court Judge, sitting by special appointment pursuant to Utah Code Ann. §78-3-24(10) (Supp. 1989).

2. The contract required monthly statements, rather than a single statement at the end of the season. Mountain Bell claimed that Estate's failure to proyide monthly billings was a breach, but the trial court found that the breach was not material, and thus, it did not excuse Mountain Bell from its obligations. *See Nielson v. Droubay*, 652 P.2d 1293, 1297 (Utah 1982); *Darrell J. Didericksen & Sons, Inc. v. Magna Water and Sewer Improvement Dist.*, 613 P.2d 1116, 1119 (Utah 1980); 4 A. Corbin, *Corbin on Contracts* §946 (1951). That finding is not contested on appeal.

3. The check for $8,613 was to have been sent with the letter; however, Mountain Bell's accounting department mailed the check without the letter. Upon learning that the check had already been mailed, Mountain Bell sent its letter, which reached Estate Landscape before it cashed the check from Mountain Bell. Estate Landscape admits that it knew that the letter was in reference to the check it had received from Mountain Bell but had not as yet cashed.

4. Note that the check was not enclosed, but rather had erroneously been sent earlier. Estate Landscape admitted, however, that it recognized that the letter referred to the check it had earlier received from Mountain Bell.

5. This course of action was not erroneous. *See National Expositions v. Crowley Maritime Corp.*, 824 F.2d 131, 133 (1st Cir. 1987); *British Caledonian Airways Ltd. v. First State Bank*, 819 F.2d 593, 595 (5th Cir.1987); *Pueblo of Santa Ana v. Mountain States Tel. & Tel Co.*, 734 F.2d 1402, 1408 (10th Cir. 1984), *reversed on other grounds*, 472 U.S. 237 (1985); *Giovanelli v. First Fed. Savs. & Loan Ass'n*, 120 Ariz. 577, 587 P.2d 763, 768 (1978); 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* §2720 at 29-35 (1983); 6 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶56.12 (1987).

In the absence of a cross-motion, the trial court should, on its own initiative, assure that the moving party has had a fair opportunity to address the grounds for the adverse judgment. *See Bonilla v. Nazario*, 843 F.2d 34, 37 (1st Cir. 1988). A careful practitioner would therefore file a cross-motion in an appropriate case, to avoid concerns over the adequacy of the movant's opportunity to address all of the material issues. In this case, the district court, and this court as well, hold that Mountain Bell failed to carry its burden in establishing an accord. Mountain Bell bore in essence that same burden both in seeking summary judgment in its favor and in avoiding an adverse summary judgment. We therefore conclude that it had ample opportunity to establish an accord but has not succeeded in doing so.

6. *Mascaro v. Davis*, 741 P.2d 938 (Utah 1987); *Sittner v. Big Horn Tar Sands & Oil, Inc.*, 692 P.2d 735, 736 (Utah 1984); *Salt Lake City Corp. v. James Constructors, Inc.*, 761 P.2d 42, 44-45 (Utah Ct. App. 1988); *Conder v. A.L. Williams & Assocs.*, 739 P.2d 634, 636 (Utah Ct. App. 1987); *see also State v. Lamper*, 779 P.2d 1125, 1129 (Utah 1989) (extraordinary intervening circumstances justifying reconsideration of a decided issue).

7. *See Branham v. Provo School Dist.*, 780 P.2d 810 (Utah 1989); *Blue Cross & Blue Shield v. State*, 779 P.2d 634, 636 (Utah 1989); *Atlas Corp. v. Clovis Nat'l Bank*, 737 P.2d 225, 299 (Utah 1987); *Lantz v. National Semiconductor Corp.*, 775 P.2d 937 (Utah Ct. App. 1989).

8. Because a summary judgment motion can be denied for at least two reasons, either because judgment is not merited or because factual issues preclude a grant of summary judgment, a trial court decision denying summary judgment should be expressed in a brief, written statement, identifying the grounds for denying summary judgment. *See* Utah R. Civ. P. 52(a). In part because of the tentatively slanted view on the facts, findings are not ordinarily made in resolving a motion for summary judgment, even if the motion is resolved on the merits. The main purpose of findings is to resolve material factual issues, *Acton v. J.B. Deliran*, 737 P.2d 996 (Utah 1987), and summary judgment cannot be granted if such issues exist. *See Taylor v. Estate of Taylor*, 770 P.2d 163, 168 (Utah Ct. App. 1989). Moreover, since the favorable factual viewpoint applied for summary judgment purposes is valid only for the motion at hand, the finality attributed to findings would perhaps tend to give too general a validity to a view of the facts that is entirely *ad hoc*.

9. *Wycalis v. Guardian Title of Utah*, 780 P.2d 821, 824 (Utah Ct. App. 1989), *cert. denied*, 127 Utah Adv. Rep. 38 (1990).

10. *See Bennett v. Robinson's Medical Mart, Inc.*, 18 Utah 2d 186, 417 P.2d 761 (1966); *Dillman v. Massey Ferguson, Inc.*, 13 Utah 2d 142, 369 P.2d 296 (1962); *cf. Marton Remodeling v. Jensen*, 706 P.2d 6097, 608-09 (Utah 1985); *Allen-Howe Specialties v. U.S. Constr., Inc.*, 611 P.2d 705 (Utah 1980). While we recognize that Mountain Bell's letter may have had the effect of severing the contract, we do not reach that question, because, for lack of mutual assent, there was no contract to be severed.

11. *Quealy v. Anderson*, 714 P.2d 667, 669 (Utah 1986) ("The scope of an accord and satisfaction is determined by the intention of the parties ...."); *see Petersen v. Petersen*, 709 P.2d 372, 375 (Utah 1985).

12. We therefore affirm, but for a reason differing somewhat from the trial court's grounds for its

decision. *See Cox v. Hatch*, 761 P.2d 556, 561 (Utah 1988).

13. *Cf. Cove View Excavating & Constr. Co. v. Flynn*, 758 P.2d 474 (Utah Ct. App. 1988), in which the acceptance of the accord was effected by negotiating a check bearing an assent to the accord on its face.

14. *Crane v. Timberbrook Village, Ltd.*, 774 P.2d 3, 4 (Utah Ct. App. 1989).

15. *See Mountain States Broadcasting Co. v. Neale*, 783 P.2d 551, 554-55 (Utah Ct. App. 1989) (construing a note as not providing for compound interest).

16. *See* Utah Code Ann. §15-1-4 (1987); 47 C.J.S. *Interest and Usury* §24 (1982).

17. *Watkins & Faber v. Whiteley*, 592 P.2d 613, 616 (Utah 1979); *Mountain States Broadcasting Co.*, 783 P.2d at 555.

18. *See Hackford v. Utah Power & Light Co.*, 740 P.2d 1281, 1283 (Utah 1987).

19. *See Stroud v. Stroud*, 758 P.2d 905 (Utah 1988), *aff'g* 738 P.2d 649 (Utah Ct. App. 1987).

JACKSON, Judge (dissenting):

The decision and order on summary judgment was entered in this case on December 29, 1986. The order denied Mountain Bell's motion, which asserted the affirmative defense of accord and satisfaction. The motion judge, who did not have before him our recent decisions in *Cove View Excavating and Constr. Co. v. Flynn*, 758 P.2d 474 (Utah Ct. App. 1988), and *Masonry Equipment & Supply v. Willco Assocs., Inc.*, 755 P.2d 756 (Utah Ct. App. 1988), ruled that "this case is controlled by *Marton Remodeling v. Jensen*, 706 P.2d 607 (Utah 1985)." But the springboard for the judge's legal analysis was that each separate day of work pursuant to the written contract constituted a separate claim. The court expressed "[reluctance] to suggest that more than one claim exists in circumstances where the dispute arises under a single written contract," but felt compelled by *Marton* to do so.

The motion judge stated, "In resolving this matter, the court cannot artificially bifurcate a single dispute in determining" whether there had been an accord and satisfaction. Contrary to that statement, the court did more than bifurcate the claim. The court treated the matter as one of multiple claims, i.e., each day's work was a claim. Thus, he considered the work on each of the thirty-one disputed days to support a separate claim for relief. I consider that premise untenable.

While the lower court did not have the benefit of *Cove View* and *Masonry Equipment*, my colleagues do. They have nonetheless elected to completely ignore those opinions--as well as the lower court's reliance on *Marton*, a decision the majority opinion tucks away in a footnote--and engage in a "mutual assent" analysis.

I would rely on *Cove View*, where, as in this case, the parties simply disagreed over the total amount to be paid on a contract. The $8,613 check was tendered by Mountain Bell with the following condition attached, with the emphasis in the original:

> Based on the above identified billing discrepancies [sic] we have enclosed a check for $8613.00 which is payment in full for satisfaction of contracted services. *If you are not willing to accept that sum, $8613.00 in full satisfaction of sums due, DO NOT negotiate the check, for upon your negotiation of that check, we will treat the matter as fully paid.*

This language clearly asserts a dispute over billing discrepancies, states three times that $8,613 is being tendered as full payment, and warns against negotiating the check. What more could Mountain Bell say to set up an offer of accord and satisfaction? Although the offer was found in Mountain Bell's letter, not on the check itself, Estate Landscape admitted knowing that the express conditions in the letter related to the $8,613 check, which it had received separately but had not yet negotiated. A creditor may not disregard the condition attached to a check tendered in full payment of a disputed claim. *Cove View*, 758 P.2d at 478 (citing *Marton Remodeling*, 706 P.2d at 609). Although the majority mysteriously finds "no indication" of Estate Landscape's assent to the offer of accord, negotiation of the $8,613 check was itself a conclusive manifestation of assent, resulting in an accord and satisfaction as a matter of law regardless of its subjective intent. *See id.*

Estate Landscape negotiated the check. That is the end of the matter. I would reverse.

Norman H. Jackson, Judge

Cite as
135 Utah Adv. Rep. 59

IN THE UTAH COURT OF APPEALS

Paul Edmond HAUMONT,
Plaintiff and Appellant,
v.
Miche Jean Arnold Evans HAUMONT,
Defendant and Appellee.

No. 880655-CA
FILED: May 24, 1990

Sixth District, Kane County
Honorable Don V. Tibbs

ATTORNEYS:

Kent M. Kasting, Salt Lake City, for Appellant

B. Summary Decision and Order denying Mountain Bell's Motion for Summary Judgment

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

ESTATE LANDSCAPE AND SNOW REMOVAL SPECIALISTS, INC., a Utah Corporation,	:	SUMMARY DECISION AND ORDER
Plaintiff,	:	CIVIL NO. ~~C-85-5471~~ C85-5197
vs.	:	
MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,	:	
Defendant.	:	

This Summary Decision and Order is for the purpose of apprising the parties and counsel of the grounds for the court's ruling and accompanying Order. A more elaborate, extensive and polished memorandum decision in this case is not necessary and would serve no useful purpose.

The issue presented is whether, under the undisputed facts in this case, there was an accord and satisfaction absolving defendant from all claims of the plaintiff for alleged breaches of the November 15, 1985 contract for snow removal ("the contract"). The discovery, defendant's memorandum of law, and Exhibit "C" thereto indicate that the defendant's refusal to pay the full amount claimed was premised on its interpretation of Exhibit "A" to the contract and specifically paragraph D thereof entitled "Rates and Charges." It was defendant's position expressed

in its letter of June 14, 1985 that it would not pay for snow removal on the specified dates when weather records indicated snow accumulations of less than four inches. No other basis for disputing the claims exist in the record before this court on defendant's Motion for Summary Judgment. There is no dispute that the amounts tendered were in fact owed in accordance with the terms of the contract.

This case is controlled by Marton Remodeling v. Jensen, 706 P.2d 607 (Utah 1985). In applying Marton Remodeling to the case at bar it is necessary to determine whether the plaintiff's original assertions constituted a single claim. In resolving this matter, the court cannot artificially bifurcate a single dispute in determining whether the purported accord and satisfaction extinguished all of plaintiff's claims. Generally, the court would be reluctant to suggest that more than one claim exists in circumstances where the dispute arises under a single written contract. This case, however, is controlled by contrary precedent.

The Supreme Court in Marton Remodeling set forth two examples of circumstances where the dispute involved more than one claim. It did so by citing with approval its decisions in Bennett v. Robinson's Medical Mart, Inc., 18 Utah 2d 186, 417 P.2d 761 (1966), and Dillman v. Massey Ferguson, Inc., 13 Utah 2d 142, 369 P.2d 296 (1962).

In Dillman the parties entered into a contract for the termination of a dealership which included a provision whereby the defendant was to purchase unused parts. Defendant sorted through the parts, accepted some, returned others, and tendered a check for only the parts accepted. The Court held that the cashing of the checks did not constitute an accord and satisfaction as to those parts rejected and returned to plaintiff. Whereas the Court in Dillman may have placed some reliance on the language of the purported release as being consistent with its ruling, the Court in Marton Remodeling expressly distingusihed Dillman as a case which "involved two claims." 706 P.2d at 609.

This court cannot distinguish Dillman from the instant case. Much like the defendant in Dillman, the defendant here accepted some claims and rejected others. As in Dillman, there appears to be no dispute as to those claims paid. To paraphrase Dillman: "The dispute was not as to the amount found due for [the services paid] but as to whether [defendant] breached its contract by refusing to [pay for all services rendered]." 369 P.2d at 298. As in Dillman, the services paid for by defendant were a liquidated amount for snow removal on the occasions when there was no contract dispute concerning accumulation. The doctrine of accord and satisfaction generally applies only to unliquidated claims. See, Calamari & Perillo, Contracts, Sections 4-10 to -12 (2d Ed. 1977).

Whereas there are other factors not referenced in this Summary Decision and Order supporting denial of summary judgment (e.g., intent, consideration, date of acceptance of payment, and the reasonable expectations of the parties), the Dillman case, in light of its interpretation and approval in Marton Remodeling, alone requires denial of defendant's Motion.

For the reasons set forth herein, defendant's Motion for Summary Judgment is denied.

Dated this 29th day of December, 1986.

Michael R. Murphy

MICHAEL R. MURPHY
DISTRICT COURT JUDGE

ATTEST
H. DIXON HINDLEY
CLERK
By _____
Deputy Clerk

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Summary Decision and Order, postage prepaid, to the following, this 24th day of December, 1986:

James W. Carter
Attorney for Plaintiff
9 Exchange Place, Suite 1000
Salt Lake City, Utah 84111

Floyd A. Jensen
Attorney for Defendant
250 Bell Plaza, 16th Floor
Salt Lake City, Utah 84111

C. Defendant's Responses to Plaintiff's Request for Admissions

FLOYD A. JENSEN, Attorney, Bar #1672
THE MOUNTAIN STATES TELEPHONE
AND TELEGRAPH COMPANY
250 Bell Plaza, 16th Floor
Salt Lake City, Utah 84111
Telephone: (801) 237-6409

FILED

Pauline Matheson

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

ESTATE LANDSCAPE AND SNOW REMOVAL SPECIALISTS, INC., a Utah corporation,	DEFENDANT'S RESPONSE TO REQUEST FOR ADMISSIONS
Plaintiff,	Civil No. C85-5197
vs.	
MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,	HONORABLE PHILIP R. FISHLER
Defendant.	

Defendant, The Mountain States Telephone and Telegraph Company (Mountain Bell), responds to plaintiff's First Set of Request for Admissions as follows:

REQUEST FOR ADMISSION NO. 1: Admit that Exhibit "A" attached hereto is a true and correct copy of a letter received by Mountain States Telephone and Telegraph Company from counsel for Estate Landscape and Snow Removal Specialists, Inc.

RESPONSE: Admits.

REQUEST FOR ADMISSION NO. 2: Admit that Exhibit "B" attached hereto is a true and correct copy of a letter received by Mountain States Telephone and Telegraph Company from counsel for Estate Landscape and Snow Removal Specialists, Inc.

RESPONSE: Admits.

REQUEST FOR ADMISSION NO. 3: Admit that suit in the instant matter was filed on or about August 8, 1985.

RESPONSE: Mountain Bell does not have knowledge as to the exact filing date of plaintiff's Complaint, however, Mountain Bell admits that it was served with the Complaint on August 13, 1985.

DATED this 30th day of June, 1986.

THE MOUNTAIN STATES TELEPHONE
AND TELEGRAPH COMPANY

By _____
Floyd A. Jensen, Attorney

Exhibit 17

KAPALOSKI, KINGHORN & PETERS
ATTORNEYS AT LAW
9 EXCHANGE PLACE, SUITE 1000
SALT LAKE CITY, UTAH 84111

LEE KAPALOSKI
GERALD H. KINGHORN, P.C.
BILL THOMAS PETERS
GREGORY L. PROBST
MARY ELLEN SLOAN

JAMES W. CARTER

TELEPHONE 801 364-5644

OF COUNSEL
PETER GRUNDFOSSEN

June 25, 1985

Mountain States Telephone and Telegraph Company
4747 North Seventh Street
Room 212
Phoenix, Arizona 85014

Re: Estate Landscape and Maintenance Snow Removal
Contract SUTD010

Dear Sirs:

We have been requested by Estate Landscape and Snow Removal Specialists to assist them in collecting amounts due under a snow removal contract with you dated December 1, 1984, by which Estate Landscape and Snow Removal Specialists was to perform snow removal services for Mountain Bell at Alta Main in Little Cottonwood Canyon.

We understand that you have been invoiced for a total fee of $30,162.50 of which $23,162.50 remains outstanding to date. We would appreciate hearing from you at your earliest convenience with regard to your plans to take care of this outstanding balance. If we have not heard from you within ten (10) days of your receipt of this letter, we have been instructed to proceed with all available civil remedies.

Very truly yours,

KAPALOSKI, KINGHORN & PETERS

James W. Carter

JWC:gh

Exhibit 5

KAPALOSKI, KINGHORN & PETERS
ATTORNEYS AT LAW
9 EXCHANGE PLACE, SUITE 1000
SALT LAKE CITY, UTAH 84111

LEE KAPALOSKI
GERALD H. KINGHORN, P.C.
BILL THOMAS PETERS
GREGORY L. PROBST
MARY ELLEN SLOAN
JAMES W. CARTER

TELEPHONE 801 364-8844

July 23, 1985

Mountain States Telephone & Telegraph Company
4747 North 7th Street
Room 212
Phoenix, Arizona 85014

Re: Estate Landscape and Maintenance Snow Removal

Dear Sirs:

We have been requested by Estate Landscape and Snow Removal Specialists to assist them in collecting amounts due under a snow removal contract with you dated December 1, 1984, by which Estate Landscape and Snow Removal Specialists was to perform snow removal services for Mountain Bell at Alta Main in Little Cottonwood Canyon, among other localities.

We understand that the outstanding balance due Estate Landscape and Snow Removal Specialists as of April 1, 1985, was the sum of $30,162.50. Estate Landscape and Snow Removal Specialists is in receipt of a check in the amount of $8,613.00 which check has not yet been cashed and which is being held as partial payment of the outstanding obligation. Accordingly, we hereby make demand upon you for payment in the sum of $21,549.50, which amount should be received in our offices within ten (10) days of your receipt of this letter. In the absence of such payment, we have been instructed to proceed with all available civil remedies to settle this outstanding account. Please govern yourselves accordingly.

Very truly yours,

KAPALOSKI, KINGHORN & PETERS

James W. Carter

JWC:gh